IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CRAIG CUNNINGHAM,)
) No. 3:15-cv-0846
v.) JUDGE CAMPBELL
) MAGISTRATE JUDGE HOLMES
RAPID RESPONSE MONITORING)
SERVICES, INC., et al.)

MOTION TO DISMISS SECOND AMENDED COMPLAINT
AND MOTION TO STRIKE

Pursuant to Rules 12(b)(1), 12(b)(6) and 12(f) of the Federal Rules of Civil Procedure, Defendants Rapid Response Monitoring Services, Inc. and Russell MacDonnell (the "Rapid Response Defendants") respectfully move this Court for an order dismissing the claims set forth in the Second Amended Complaint (DE: 57). In support of this Motion, as detailed in the accompanying Memorandum, Mr. Cunningham's Second Amended Complaint should be dismissed for the following reasons:

1. Mr. Cunningham lacks standing to bring claims under the Telephone Consumer Protection Act ("TCPA") because he cannot establish injury in fact, which is a prerequisite to establishing constitutional standing under Article III of the United States Constitution and therefore this Court lacks subject matter jurisdiction.

2. Mr. Cunningham further lacks statutory standing because his interests as a professional TCPA plaintiff do not fall within the zone of interest protected by the TCPA. Dismissal is therefore appropriate under Rule 12(b)(6).

3.   The Rapid Response Defendants are not "sellers" as defined under the TCPA regulations. Therefore, they cannot be held vicariously liable for the alleged unlawful telemarketing conducted by other parties, entities or individuals.

4.   The Second Amended Complaint fails to state a claim that Rapid Response Defendants are vicariously liable under agency principles and ratification.

5.   Mr. Cunningham's conspiracy claim is based upon conclusory statements. Because there is no factual support for this claim, it should be dismissed.

6.   Mr. Cunningham's claim against Mr. MacDonnell is similarly based upon conclusory statements. There is no proof offered to show that Mr. MacDonnell had any personal involvement. Therefore, he should be dismissed.

7.   Finally, Attorney's fees are not recoverable and the request should be stricken under Rule 12(f).

In support of this Motion, the Rapid Response Defendants rely upon the following:

1.   A Memorandum filed in support of Rapid Response Defendants' Motion to Dismiss and Motion to Strike;

2.   The June 29th Audio Recording (previously filed as DE: 24);

3.   Agreement for Central Station Services, dated June 29, 2006 ("Agreement"), which is attached as Exhibit A to the Affidavit of Russell MacDonnell (DE: 60-1);

4.   September 1, 2013 Addendum to the June 29, 2006 Agreement for Central Station Monitoring Services ("2013 Addendum"), which is attached as Exhibit B to the Affidavit of Russell MacDonnell (DE: 60-2);

2

5.   A copy of the June 27, 2015 audio recording by Mr. Cunningham of the alleged "safety survey" (Safety Survey Recording). The Safety Survey Recording will be manually filed separate from this Motion, but it is incorporated herein by reference as <u>Exhibit 1</u> to this Motion.

Wherefore, the Rapid Response Defendants request that the Second Amended Complaint be dismissed.

Respectfully submitted,

ORTALE, KELLEY, HERBERT & CRAWFORD

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3

<div align="center">**CERTIFICATE OF SERVICE**</div>

The undersigned attorney certifies that on August 19, 2016 a true and exact copy of this Motion has been served through the United States Mail on the following:

Craig Cunningham
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Suite 248
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Pro se Plaintiff

Furthermore, on this same date, a true and exact copy of the foregoing was served on the following through the Court's CM/ECF system upon the following:

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/s/ Michael T. Schmitt
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4